No.: 89-1140

(3)

IN THE

Supreme Court of the United States

October Term, 1989

IN RE: GRAND JURY SUBPOENA
SERVED ON JOHN DOE

JOHN DOE, A GRAND JURY WITNESS,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REASONS FOR GRANTING THE WRIT

I
THE SOLICITOR GENERAL HAS CLEARLY FOCUSED ON THE LEGAL DEFECT AND THE CONSTITUTIONAL THREAT OF THE SECOND CIRCUIT OPINION

The Solicitor General asserts that the Court of Appeals, in this first impression opinion, did not put its blanket imprimatur on court authorization of electronic surveillance of

any communications, even those which are not Title III 'designated' offenses (Res. 8).

Yet, by illogically mincing words and distorting basic legal concepts, the Solicitor General has underscored clearly the wholesale dismantling effects of the self-same Court of Appeals opinion upon Title III.

a) The Government Concedes That Interception of Communications For Federal Tax Offenses May Not Be Initially Authorized

The Solicitor General (Res. 7), as well as the Court of Appeals (C.A. App. 8a), has acknowledged that federal tax offenses are not among the Section 2516 designated offenses for which electronic surveillance can be authorized in any initial Title III order.

b) Interception First; Authorization Later Is Acceptable

However, The Solicitor General further asserts, the Court of Appeals opinion does approve the 'use' of the non-authorized interceptions of non-designated offenses so long as such interceptions were completed *prior* to authorization. (Res. 8).

Merely as an aside, the Solicitor General candidly recognizes (Res. 8, ftnote 3) that this proposition "implicitly authorizes and approved use of later interceptions of such evidence when, having been informed that such interceptions had previously taken place, (a court) issues orders extending the original electronic surveillance order."

Therein lies the rub. For in that desperate illogic, by approving the possibility of constitutional incursions, the Court of Appeals has approved the incursions themselves. These incursions totally emasculate Title III.

c) Nunc Pro Tunc Is Not New To The Law

It is, of course, true that Section 2517 of Title III, under carefully set forth restrictions, permits use of wire, oral, or

electronic communications relating to offenses other than those specified in an initial order of authorization.

But such use of unauthorized electronic interceptions can be subsequently approved by a court *only* when "the contents were otherwise intercepted in accordance with the provisions of this Chapter (Title III)" [2517(5)].

In other words, lack of prior authorization of certain offenses not specified in the authorizing order may be subsequently approved, nunc pro tunc, where the interception had been otherwise conducted in total conformity with all legal mandates of Title III save only for the existence of an initial authorization.

To underscore here the crystal clear intent of Congress, each of the five (5) sub-sections of disclosure or use enabling Section 2517, contain the Congressional admonition that electronic interceptions may be used or disclosed ONLY where such interceptions were obtained *by means authorized by this chapter.* (1)

In sub-section 5 of Section 2517, which specifically deals with the use of interceptions of communications *other* than those specified in an initial authorizing order - as here - Congress admonished not once, but twice, at both the beginning and at the end of the said sub-section *that the intercept MUST be obtained in the manner otherwise authorized by Title III.*

Congress never indicated, directly or indirectly, that non-designated offenses were at any time open to electronic interceptions.

Congress merely provided in Section 2517 sub 5 that during a lawfully authorized intercept aimed at certain specified designated offenses, interception of 'other' offenses, if all other criteria of Title III be met, might be approved nunc pro tunc.

d) Offenses For Which Interception Is Void Can Not Be Validated Nunc Pro Tunc

This concept of nunc pro tunc approval of that which is otherwise lawfully obtained, save only for the technical timing of its validation is academic.

Equally academic is the fact that what is void, what was never alive, and, thus, can not be revived or revitalized.

In this case, Congress specifically omitted federal tax offenses from the list of designated offenses for which electronic intercepts might be utilized.

Initial orders to intercept evidence of federal tax offenses are impermissible. Secondary orders, which the very language of Section 2517 (5) requires to be "otherwise lawfully obtained" can not, retroactively, be more alive, more susceptible of being alive than its non-existent progenitor.

The Court of Appeals has fashioned, from bits and pieces, a retroactive method of revitalizing something that never existed in the first place. This Frankenstein opinion, however, if permitted to stand virtually shall destroy the very fabric of the protections of Title III which, in the words of Senator McClellan, one of the main proponents of the legislation:

> "***(Title 3) is not only a bill to aid law enforcement officials in detecting crime and apprehending the criminals but it was also a bill to protect the private citizen from invasion of his privacy.
>
> "***I hope, too, that our judiciary, even with crowded dockets, is always taking the necessary time to examine and pass on all Applications thoroughly. The part that they must play in scrutinizing and questioning these Applications as well as requiring strickt adherence to the statutory standards can not be over emphysized***."

II
THE COURT OF APPEALS OPINION PERMITTING RETROACTIVE AUTHORIZATION OF NON-DESIGNATED OFFENSES VIRTUALLY ABROGATES TITLE III

Nowhere has the Court of Appeals, the Solicitor General, The Court at Nisi Prius, the Department of Justice pointed to a single word of Title III which permits or even purports to permit the initial authorization for or the subsequent use of electronic surveillance to investigate Federal tax offenses.

The reason that no one, nowhere cites for this Court a single word of statutory support for the use of electronic surveillance to investigate federal tax offenses is that there are nonesuch.

a) Lacking Statutory Authority, The Government Must Rely Only On Legislative History

Lacking any statutory language whatsoever, all who support the retro-authorizing order herein are forced to cite the legislative history, the Senate Report, which accompanied Title III, to torture a semblance of an argument.

The Legislative history is not the statute.

The writer of the Legislative history is not Congress.

The Legislative history is *obiter dictum*, it is spoken *ex cathedra*. It does not have the binding effect that the specific and clear language of that statute has.

b) The Court of Appeals Has Fashioned An Apparent Exception

All who would argue in favor of the "apparent exception" fashioned by the Court of Appeals, to wit, "the Senate Report accompanying Section 2517(5) states that 'other' offenses' under that section 'need not be designated offenses,'

an apparent exception**** (C.A. 8a) must argue around the plain language of the statute.

Nowhere does the statute make the slightest accommodation for the opinion of the Court of Appeals. Indeed, quite the contrary, Congress, when it authorized subsequent approval of communications relating to offenses other than those specified in the authorizing order, *twice* insisted that the communication *must* be otherwise intercepted in accordance with the provisions of this chapter [2517(5)].

While the Solicitor General asserts that "the legislative history confirms that Congress did not intend the statutory test to impose the unexpressed limitation petitioner urges (Res. 10), the statutory language clearly supports Petitioner.

c) Acceptance Of The Government's Argument Is Recognition Of The Death Of Title III

Surely Congress was aware of federal tax law offenses when it specifically omitted such offenses from the Section 2516 designated offense list.

To now permit a court even to approve use - not interception - but use of electronic surveillance for non-designated offenses previously obtained by law enforcement officers during an interception for other designated offenses means that any offense, designated or not, can be intercepted, merely depending upon the time of the intercept and the timing of the application for authorization.

d) Here The Non Authorized Offenses Were Clearly Anticipated

Evasions of federal taxes were not only anticipated herein, but were mentioned to the authorizing Judge, in the initial Application as potential offenses which would be overheard.

Notwithstanding the fore-knowledge of such potential interceptions, no authorizing order was executed because such was legally impermissible.

To permit the Joint Task Force herein to come back a short while later, and without giggling, suggest to the same Court that *now* there had been interceptions of 'other crimes' which had been 'otherwise' legally intercepted is to make a mockery of Title III and to insult the honest intelligence of the Court.

To permit this sort of gamesplaying in the name of the Justice System, in the interpretation of Congressional intent, is a travesty, plain and simple.

Respectfully Submitted,

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